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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 513

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Petitioners,

—v.—

FIRST NATIONAL BANK IN DALLAS in its private capacity and as trustee of the O'Connor and Morgan trusts and the Attorney General of Texas,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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FIRST NATIONAL BANK IN DALLAS in its private capacity and as trustee of the O'Connor and Morgan trusts and the Attorney General of Texas,

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REPLY BRIEF FOR PETITIONERS

Respondent Bank, speaking with three separate voices,[1] opposes the granting of the petition on a variety of grounds which would obscure the primary issue here involved in a plethora of irrelevancies and inaccuracies. Respondent's contention, Arms. Br., pp. 5, 6, that the petition "is based primarily on procedural matters on which the decision of the Court of Appeals is final under the federal judicial

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[1] Three separate briefs in opposition have been filed by different lawyers acting on behalf of respondent Bank: the first, on behalf of the Bank in its "private", or "individual", capacity, hereinafter referred to as "Coke Br.", the second, on behalf of the Bank as "successor trustee of the James Charles O'Connor trust", hereinafter referred to as "Brin Br.", and the third, on behalf of the Bank as "successor trustee of the Ivor O'Connor Morgan trust", hereinafter referred to as "Arms. Br.".

structure", is, of course, wholly unfounded. See, e.g., *First National Bank* v. *Cities Service Co.*, 391 U. S. 253 (1968); *Provident Tradesmen's Bank* v. *Patterson*, 390 U. S. 102 (1968); *International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64 (1967); *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964); *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48 (1952).

Indeed, the increasing use of the "special verdict" procedures sanctioned by Rule 49(a) of the Federal Rules of Civil Procedure, to which this Court appears never to have spoken, and the utter confusion, if not the virtual denial of the right of fair trial, to which the untutored use of such procedures must, as it did in this case, inevitably lead, point directly to the "importance to the public" of an authoritative resolution by this Court of a "problem which is beyond the academic or the episodic", and which goes to the very heart of the administration of justice by the federal courts. *Layne & Bowles Corporation* and *Rice, loc. cit.*, Arms. Br., pp. 5, 6.

I.

Rule 49(a) of the Federal Rules of Civil Procedure is explicit that in requiring a jury to return special verdicts, "[t]he Court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue". The first of the questions here is the soundness of the decision of the Court below that in its charge to the jury the District Court obeyed this injunction.

Petitioners have urged, Pet. 19-23, that the disputed charge, Pet. 11; I R. 292, in effect withdrew from the jury any question concerning the binding effect of the State

Court judgment insofar as concerned Mrs. Grey, and, insofar as concerned James and Michael, left for the jury's determination only whether the attorney who purported to appear for them in the State Court action had authority to do so. The Court below rejected petitioners' contention, holding that the charge in question related merely to "the issue of the State Court's jurisdiction", i.e., its personal jurisdiction over petitioners, and that this "was completely separate from the issue" whether respondent "fraudulently obtained that judgment". Pet. 11, 16(a); 393 F. 2d at 382.

But what the District Court intended the jury to understand by her charge, and what the jury understood it to mean are, at least, obscured by an abundance of ambiguities. Thus, it will be observed that in instructing the jury with respect to the contentions of plaintiffs, i.e., petitioners here, I R. 291, the District Court made no mention of petitioners' basic contention that the State Court judgment was not binding on them because it had been obtained by fraud. It will also be observed that in instructing the jury with respect to the "issues in this case for your decision", I R. 292, the District Court makes no reference to the basic issue whether the State Court judgment had been induced by fraud, and was, therefore, not binding on petitioners. The only reference to petitioners' contention with respect to the State Court judgment appearing in the District Court's instructions to the jury, was that James and Michael contended "that they did not authorize the employment" of the lawyer who purported to appear for them in that case. I R. 291. Moreover, while the District Court *overruled* respondent's motions at both the end of the plaintiffs', i.e., petitioners' case, and at the end of the whole

case, III R. 1470, 1471; IV R. 1786, 1787; Pet. 9, 10,[2] in taking the earlier action, the District Court said, III R. 1471:

> I would like to say, however, that *I am not going to submit anything to the jury with reference to the State Court case except the question of authority of Mr. Kelton,* and that really the effect of the submission that I have in mind is that *I am affirming or saying that the partition and sale is approved as far as Mrs. Grey and the O'Connor Trust is concerned,* and that the only thing I am submitting to the jury is the issue of damages. [Emphasis supplied.]

The District Court then noted with rare sagacity that, "I am not sure that I am making myself clear," adding, III R. 1471,

> "but I think that there are two reasons why there are no grounds for setting aside the partition—one is that I do not think that it would be equitable to do it, and the second is that *it has been approved by the State Court, and that the O'Connor Trust and Mrs. Grey were represented, and the lawyers who represented them were authorized to act, so that I see nothing to submit to the jury as far as partition and sales agreement is concerned.* [Emphasis supplied.]

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[2] More precisely, at the end of plaintiffs', i.e., petitioners', case, the District Court overruled defendant's, i.e., respondent's, motions for a directed verdict except the motion made in its capacity as successor trustee of the Ivor O'Connor Morgan Trust, which was granted because only equitable relief was demanded with respect to such trust. III R. 1467-1469. As already noted, Pet. 10, the District Court very early determined that there would be no equitable relief. IV R. 1809, I R. 33.

With this as the District Court's exposition and explanation of what she intended to leave to the jury, the decision of the Court below is inexplicable.

Certainly, if the District Court intended to leave the jury to understand that the State Court judgment was to be disregarded by them if they found that it had been obtained by fraud, she nowhere told them so in her charge. In any event, if the disputed charge is, indeed, susceptible of the very limited meaning attributed to it by the Court below, it is also clearly susceptible of the meaning petitioners attribute to it, and which it would appear the District Court actually had in mind. In this ambiguous posture, the instruction cannot meet the requirement of Rule 49(a) that the jury be given "such explanation and instruction concerning the matter • • • submitted as may be necessary to enable the jury to make its findings upon each issue". Respondent's several oppositions to the petition make this clear.

In its "private" or "individual" capacity respondent urges in opposition to the petition that the meaning attributed by the Court below to the disputed instruction is altogether correct in that "the charge as a whole" admits of no other interpretation. Coke Br., pp. 8-10, 16, 17. However, in its capacities as successor trustee of the James O'Connor and Ivor O'Connor Morgan trusts, respondent in effect takes the position that the State Court judgment was not under Texas law open to petitioners' attack and, defends the disputed instruction on the ground that there was no issue in that regard properly to be submitted to the jury.[3] Brin. Br., pp. 8-12; Arms. Br., pp.

[3] Respondent's exposition of the distinction between "intrinsic" and "extrinsic" fraud as the basis for an attack on a judgment

14, 15. But the standard established by Rule 49(a) for instructions to a jury when special verdicts are required, is not met when in order to be understood, an instruction needs such explanations as the Court below and the respondent have advanced.

Certainly, if the respondent's own counsel in its several capacities can in good conscience advance divergent views as to the significance of the disputed instruction, who can say what it meant to the jury?

Respondent's effort, Coke Br., p. 18, to distinguish *Callen,* Pet. 21, 22, is unavailing. There the question was

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under Texas law, Coke Br., p. 17, fn. 8; Brin. Br., pp. 8-12; Arms. Br., pp. 6-7, is wholly beside the point, for the District Court is completely silent on this score, and the Court below expressly avoided the question on the ground that it was academic because "the jury found that the state court judgment was not procured by fraud". Pet. 12a, 13a, fn. 8; 393 F. 2d at 380, fn. 8. The jury, however, did not so find, as no special verdict in that regard was required of it. In any event, the jury's special verdicts Nos. 2 and 3, to which the Court below refers, Pet. 12a, 393 F. 2d at 380, are clearly inconclusive, not only because of the ambiguity of the questions as put by the District Court, but also because if the jury understood the disputed instruction as petitioners, and respondent in two of its capacities do, the jury had no alternative but to answer negatively. See Pet. 12, 13, 20, 21.

Substantively, moreover, the applicable Texas authorities do not support respondent's position. On the contrary, they make it clear that under Texas law, an action to set aside a prior judgment will lie if it was rendered in favor of a party who remained silent *notwithstanding a duty to speak* and the other party was thus left unaware of a valid defense. *McMurry* v. *McMurry,* 4 S. W. 357 (Tex. Sup. Ct. 1887); *Schneider* v. *Sellers,* 61 S. W. 541 (Tex. Civ. App. 1900); *State* v. *Wright,* 56 S. W. 2d 950, 952; *Eldridge* v. *Eldridge,* 259 S. W. 209, 214 (Tex. Civ. App. 1924); *Reed* v. *Bryant,* 291 S. W. 605 (Tex. Civ. App. 1927); *Ralls* v. *Ralls,* 256 S. W. 688, 695 (Tex. Civ. App. 1923). Here, of course, respondent, as petitioners' trustee and agent, was under a duty to speak.

whether a release was "binding"; here the question was whether a State Court judgment was "binding". There, in effect, the Court charged that the release was "not binding", except to the extent of the consideration paid therefor; here the charge was that the State Court judgment was "binding" on Mrs. Grey, and was binding on Michael and James, as well, if the attorney who purportedly appeared for them had authority to do so. If, as this Court held in *Callen,* the charge there had the effect of taking the basic issue in the case from the jury, notwithstanding the trial court's efforts at correction, *a fortiori* the charge here had that effect, for the District Court made no effort whatsoever at any correction or clarification.

II.

While it may be, as respondent contends, Coke Br., p. 20, that under Texas law "silence, where the party is under a duty to speak, may amount to a concealment", the question here is whether the District Court's instructions to the jury were such that the jury must reasonably be taken to have understood the word "concealed" as used by the District Court in its Special Issue No. 3, Pet. 12a, I R. 289-304, to include mere silence on respondent's part, regardless of good faith. Certainly, the jury cannot reasonably be said to have gotten such an understanding from the disconnected excerpts from the District Court's charge to which the Court below refers. Pet. 14a, 15a; 393 F. 2d at 381, 382. Thus, the District Court's statement to the jury that respondent contended that "it made full disclosure" to petitioners, did not instruct the jury that an innocent failure of respondent to disclose a material fact was of equal significance to a purposeful concealment of such a fact in bad faith.

Nor was the jury so instructed by the District Court's statement that "there must be fair dealing and good faith by the Trustee toward the beneficiary. The Trustee * * * has a duty to impart to the beneficiary all material facts * * *". For with the element of "good faith" so injected, how could the jury have understood that mere failure to disclose, not in bad faith, was encompassed by the word "concealed"?

In any event, nothing in any of respondent's oppositions to the petition, nor in the opinion of the Court below is adequate to overcome the failure of the District Court expressly to include "failure to disclose" in the special issues submitted to jury. Respondent's "failure to disclose" was expressly an issue in the case, Pet. 24-26, and petitioners expressly requested that such issue be submitted to the jury. Pet. 25. As respondent has so aptly put it, Arms. Br., p. 11, the District Court "should, especially where requested to do so, submit questions covering all issues raised by the pleadings".

III.

The record readily supplies the short answer to respondent's contention, Coke Br., p. 22, that petitioners are in error in asserting, Pet. 15, that it was admitted by respondent "in its answer that it had not made disclosure * * * of Majors' indebtedness to it secured by the Republic Garage Building". Thus, in their complaint, I R. 64, 65, 67, petitioners alleged:

> Neither at the time said representations were made * * *, nor at any other time material hereto, did defendant Bank disclose to any of the plaintiffs that
>
> * * * * *

> (j) On or about March 21, 1956, Z. L. Majors, Trustee, executed and delivered to defendant Bank a deed of trust upon the Republic Garage Building as security for the aforesaid alleged loan of $650,000.00, as evidenced by a promisory note of even date, and since March 23, 1959, said deed of trust and note as renewed had been in default.

Respondent's answer to this allegation was, I R. 190:

> (j) Because of the death of Z. L. Majors, Trustee, defendant cannot admit or deny, as a factual matter, that the note referred to was in default. Defendant admits the other allegations contained in subparagraph (j) but alleges that plaintiffs had notice of such deed of trust and note by virtue of the fact that said deed of trust was duly recorded in the Deed of Trust Records of Dallas County, Texas.

Clearly, petitioners' reference was, correctly, to respondent's admission in regard to the loan to Majors on the Republic Garage, and not to "the acquisition by Z. L. Majors, Trustee, of the A'Mell Building", as respondent mistakenly contends. Coke Br., p. 22.

Petitioners not only called the District Court's attention, Pet. 15, to the foregoing significant passages from the pleadings, but to the pages of the transcript where Stewart, respondent's president testified as follows, II R. 499, 505:

> Q. Mr. Stewart, did you ever tell Mr. Dorsey, Mrs. Grey, or her son James, that the bank held a deed of trust on the Republic Garage Building as a security

for a debt in the amount of $650,000? A. I said I don't recall that [I] did.

* * * * *

Q. You did not feel that you should inform Mrs. Grey or Mr. Dorsey or her son that the bank at that time held a note and deed of trust on the Republic Garage Building? A. You are asking me if I thought I should tell her that?

Q. Yes, sir. A. I certainly did not.

Petitioners also directed the District Court's attention to the page of the transcript where Presley, respondent's senior vice president, testified as follows, III R. 1016:

Q. All right, were you asked as to whether or not the Bank held a mortgage from the Majors on the Republic Garage Building? A. We were not asked that question.

Q. Did you give any information to that effect? A. I don't recall that we gave any information to that effect.

The record, I R. 363, is also clear that when the District Court advised counsel of the jury's inquiry as to whether any testimony indicated disclosure by respondent to petitioners of Majors' indebtedness to respondent secured by the Republic Garage Building, petitioners' attorneys directed the Court's attention to the foregoing pleadings and testimony with particularity, and "requested that the Court instruct the jury that there was no such testimony in the record and that it was undisputed that the Bank had not advised" petitioners thereof.

Respondent misplaces reliance, Coke Br., p. 21, on a stipulation between the parties that on *August 21, 1961,* respondent advised petitioners' attorneys about the Majors-Republic Garage loan. For the partition and sales agreement was executed on *September 19, 1960,* and the State Court judgment was entered on *November 28, 1960.* I R. 118, 136. Moreover, it will be noted that special issues Nos. 2 and 3 submitted to the jury, and to which alone its inquiry was relevant, referred specifically to times antedating "the partition and sales agreement of September 19, 1960, and the judgment of the State Court of November 28, 1960". I R. 297, 298.

Respondent's effort, Coke Br., pp. 22, 23, to distinguish *Jackson,* Pet. 27, is utterly unavailing. Respondent's admission in its answer, and through the testimony of its president and senior vice president, leaves no room for cavil, ~~that the correct answer to the jury's inquiry was simply "No". For,~~ there was no issue regarding the utter failure of respondent to make disclosure of Majors' indebtedness secured by the Republic Garage Building, and contrary to respondent's views, Arms. Br., p. 12, even under Texas procedure in this regard, which allows the trial court less leeway than federal procedure, it has long been held, *Int. and G. N. R. R. Co.* v. *Stewart,* 57 Tex. 166, 170 (1882) that:

> Where the evidence to a fact is positive and not disputed or questioned, it is to be taken as an established fact, and the charge of the Court should proceed upon that basis.

Certainly, this rule must prevail where in the absence of such a charge, the jury itself requests that it be in-

structed. In these circumstances petitioners were, as the Court said in *Jackson,* 257 F. 2d at 43, "entitled to have the jury informed as a matter of right".

IV.

Respondent's strong language, Arms. Br., p. 12, in regard to the fourth ground asserted in support of the petition, Pet. 10, 28, is wholly without warrant. Indeed, the shoe is on the other foot. Moreover, contrary to respondent's contention, petitioners did present to the Court below the matter of the District Court's apparent "bias and prejudice" in a section of their brief in the Court below (pages 5-7) headed "Trial Court Prejudged The Case", which is set out *in toto* in the Appendix hereto, pp. 1a *et seq.* While this was not expressly adverted to in the Specification of Error, so-called, that omission is immaterial because such Specification, under Rule 75(d) of the Federal Rules of Civil Procedure is no longer required,[4] and under the Rules of the Court below, is but a part of an appellant's brief, and both respondent and the

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[4] As stated in the Committee note to the 1966 revision of subdiv. (b) of Rule 75:

> "The appellant is required to serve a statement of the issues which he intends to present on appeal if only a part of the proceedings is transcribed solely to allow the appellee to determine whether the partial transcript will be adequate for the determination of those issues. Such a statement is not the equivalent of an assignment of errors, which was specifically declared to be unnecessary by the terms of former Rule 75(d) (the former provision dispensing with the assignment of errors is omitted from the rule only because the requirement of an assignment is deemed sufficiently obsolete as not to require pointed abolition) and the statement should not result in limiting the issues on appeal".

Here all the proceedings in the District Court were transcribed and transmitted to the Court below.

Court below had full and timely notice of petitioners' contentions in this regard.

Neither *Lawn, Husty,* nor *Duignan,* on which respondent relies, Coke Br., p. 24, supports respondent's contention. In *Lawn,* the Court rejected as a ground for a new trial in a criminal case that certain exhibits had been unlawfully seized in violation of the defendant's constitutional rights where the defendant's attorney with full knowledge had used such exhibits to corroborate an aspect of the defendant's defense and had expressly stated that he had "no objection" to their receipt in evidence. In *Husty* the Court refused to review rulings of the trial Court excluding certain evidence, on the ground that such rulings "were not assigned as error on the appeal to the Court of Appeals, *and it does not appear that they were presented or passed upon there*". 282 U. S. at 701, 702. Similarly, in *Duignan,* the Court refused to consider a constitutional question because "The assignment of errors below did not refer specifically to it * * *, *and so far as the record discloses it was not presented there*". 274 U. S. at 200 (emphasis supplied). Here, the point was made in the Court below. *Infra,* pp. 1a *et seq.*

The remarks of the District Judge to which petitioners have averted, Pet. 10, were not, as respondent says, Coke Br., p. 24 "carefully selected for quotation by the petitioners," but, rather, were carefully selected by someone having authority to issue directions to the court reporter to be "edited and omitted from the original transcription * * *", I R. 27.

The hollowness of respondent's contention that "taken in context" the District Judge's remarks "show a re-

spectful attempt * * * at a 'simplification' of the issues", Coke Br., p. 24, is laid bare when one reads them in context and recalls that somehow or other they had been "edited and omitted" from the transcript, to be restored to the record only after petitioners brought on a motion, the prosecution of which included taking the testimony of the court reporter. I R. 27, 32-33; IV R. 1809, I R. 33. Petitioners and their counsel exhibited great restraint, tolerance and respect in not filing an affidavit of "personal bias or prejudice" against the District Judge. Certainly, their forbearance should not result in their further prejudice.

V.

Respondent contends, Coke Br., p. 25, that the issue concerning Kelton's authority to represent James and Michael in the State Court case, Pet. 15-18, 29-32, presents "[n]o important question of Federal law." Respondent also contends, Brin. Br., pp. 5-7, that, in any event, under applicable law, Kelton's lack of authority to appear for James and Michael could not be established in this action by evidence *dehors* the record in the State Court case. Both of these contentions are refuted by *Cooper* v. *Newell*, 173 U. S. 555 (1899), the holding and reasoning of which are no less cogent today than when it was written.

Cooper came to this Court on certificate from the 5th Circuit inquiring whether the judgment of a Texas state court was subject to "collateral attack" in a federal court by evidence showing that Newell, the defendant in the state action and plaintiff in the federal action attacking the earlier judgment, was served with neither citation nor process, and that the attorney who had purported to appear in

the state action for him did so without his authorization. Holding that federal courts have the power to entertain and determine such actions, and that "the question of jurisdiction [of the court which rendered the earlier judgment under attack] is open to inquiry even when the judgment of a court of a state comes under consideration in a court of the United States, sitting in the same state," 173 U. S. at 567, this Court said, 173 U. S. at 568, 569:

> It must be remembered that this action was commenced by Newell as a citizen of New York against citizens of Texas, *in the exercise of a right secured to him by the Constitution of the United States,* and it would go far to defeat that right if it should be held that he was cut off • • • from proving • • • *that he had not authorized any attorney to appear for him in that action.* [Emphasis supplied.]

Cooper recognizes, 173 U. S. at 566, 567, that federal courts, regardless of their location, have the same authority as state courts to inquire into the jurisdiction of a court of another sovereignty to render a judgment in issue before them, and are not bound to give judgments of the courts of any state "full faith and credit" except to the extent required of the courts of another state, observing, 177 U. S. 566, that:

> In Thompson v. Whitman, 18 Wall. 457, a leading case in this court, it was ruled that "neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a

> judgment offered in evidence was rendered"; that *"the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist"* • • • . [Emphasis supplied.][5]

Nor is respondent on any surer ground in asserting, Coke Br., p. 25, fn. 16, in effect, that Kelton's disqualification to represent James and Michael by reason of conflict of interests, Pet. 18, 32, was not urged below. This point *was* raised below, under broad specifications of error,[6] in appellants', i.e., petitioners', brief, where petitioners urged (fn. 11, pp. 19, 20):

> The fact that it appears from the judgment roll of the 1960 state court action, relied upon by Bank as validating its self-dealing, that the *same attorney* represented Bank, Trustee, *and* the beneficiaries renders absolutely void the 1960 state court judgment because of the conflict of interest between his clients.

Likewise untenable is respondent's assertion, Coke Br., p. 25, fn. 16, that Dorsey's letter to Mrs. Grey of November 9, 1960, advising her that he had authorized Kelton to represent the O'Connor Trust, Mrs. Grey and James and Michael in the State court proceedings had the effect of making "Mrs. Grey (and in all probability James and

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[5] See *Sidran* v. *Tannenbaum*, 391 S. W. 2d 93 (Tex. Civ. App. 1965), citing *Cooper*.

[6] Respondent professes to ignore that specification of errors is no longer required, *supra* p. 12 fn. 4.

Michael)" aware of the conflict. Indeed, not only is the record here clear that neither James nor Michael had any knowledge of Kelton's purported representation of them, Pet. 16, but as a matter of law even their express consent to Kelton's employment would have been ineffective. Pet. 32, fn. 19.[7]

The disqualification of Kelton to appear for petitioners supplies a conclusive answer to respondent's misplaced reliance, Brin Br., pp. 12-13, on the presumption of authority of an attorney entering an appearance for a party, for it is obvious that such presumption does not apply with respect to an attorney disqualified to act for that party.

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[7] Under Texas law, even the consent of the client does not remove the disqualification of an attorney who represents conflicting interests. *J. W. Hill & Son, Inc.* v. *Wilson*, 399 S. W. 2d 152 (Tex. Civ. App. 1966); *W. C. Turnbow Petroleum Corp.* v. *Fulton*, 199 S. W. 2d 263, 264 (Tex. Civ. App. 1946). In *Bryant* v. *Lewis*, 27 S. W. 2d 604, 606-607 (Tex. Civ. App. 1930) it was held that the only exception to this rule is when the adverse interests *are not conflicting*, such as when an attorney adjusts differences as an arbiter, stating: "That even in such cases *all the facts*, and the extent of such adverse representation should be *fully understood* by both parties" and that the attorney must "affirmatively disclose to [the client] not only *all material* facts which would affect their relationship but to disclose *the legal consequences* of these facts as well". (Emphasis supplied.) Here, not only were the interest of the trustee and of the beneficiaries clearly conflicting, but Dorsey's letter to Mrs. Grey of November 9, 1960, VIII R. 1135, and the very partition and sale agreement, I R. 108, had misled her into believing that the interest of the Bank as Trustee of the O'Connor Trust and her own were identical and that the State court proceeding was a ministerial matter to be taken care of by respondent. How could then it be seriously argued that James and Michael, who had not even been informed either by respondent or by Dorsey or by anyone else of their rights and interests, or that they would have to be represented in the State court proceeding, II R. 516, 521; III R. 1248, 1249, 1245, 1247, IV R. 1754, had "in all probability" consented to be represented by an attorney acting for conflicting interests, with full understanding of the conflict and knowledge of the consequences thereof.

Indeed, even if there was no real conflict of interest, it would have been incumbent upon such attorney to prove that his alleged client's consent was given with full knowledge of the facts and understanding of their legal consequences. *Supra* p. 17, fn. 7.

It is also dispositive of respondent's belabored efforts, in complete disregard of Dorsey's own admission, Pet. 16, to discover some inference of Dorsey's employment by James and Michael in this matter from isolated sentences of testimony quoted out of context. Obviously, even if Dorsey had been employed by James and Michael with respect to the sale of the A'Mell Building and the State court proceeding, he certainly had no authority to delegate it to an attorney representing the conflicting interests of the adversary.

Moreover, respondent's truncated quotations, Coke Br., p. 14, fns. 5, 6, from Mrs. Grey's and Michael's testimony are misleading. Thus, the first passage quoted from Mrs. Grey's testimony, which related to the time of the State Court hearing, was immediately preceded by the following, III R. 1388, 1389:

> Q. So, if you had been present [at the State Court hearing] in person, you would have taken the same position that all the attorneys took, wouldn't you? A. At that time.
>
> Q. At that time? A. I would have, yes.
>
> Q. Then up until January, 1961, you did not want it to come about where you'd have to return those properties, seven pieces of property that you got, and the money, did you? A. That's right.
>
> Q. Nor did your sons, did they? *A. They knew so very little of it, I can't speak for them.* [Emphasis supplied.]

Similarly, the second passage quoted from Mrs. Grey's testimony, III R. 1296, was immediately preceded by the following:

> Q. Did you advise James and Michael what was going on with respect to those properties at that time? A. Well, I tried to but they weren't very interested * * * about it. They didn't feel it had anything to do with them.
>
> *Q. Well, they knew and appreciated that they were remaindermen in these properties? A. No they did not.*
>
> Q. They did not? A. They did not.
>
> Q. They didn't know they had interest in this property? A. They just didn't understand it.
>
> Q. Is it your testimony that they had no idea they had an interest in this property? A. I tried to make them understand it but it was never something they took seriously. [Emphasis supplied.]

Again, the passage quoted from Michael's testimony, II R. 576, continues as follows:

> Q. What have you argued with her [Mrs. Grey] about the Dallas property? A. I haven't argued anything about it.
>
> *Q. Well, you have been in complete accord with her, then, is that it? A. Well, I have never discussed Dallas matters with her, sir.*
>
> Q. Then, you have never mentioned it one way or the other from the beginning of time up until now, is that what you mean? A. Well—yes, sir.
>
> Q. Sir? A. Yes, sir, that's what I mean. [Emphasis supplied.]

Respondent's quotation, Coke Br., p. 15; Brin Br., p. 14, of Michael's testimony on deposition to the effect, II R. 572, that he "believed" that Dorsey "was handling the family interests", his, and his brother's and mother's "at the same time", is also misleading, for, at the trial, on cross-examination by an attorney representing the bank in one of its several capacities, Michael testified with respect to such testimony, II R. 572, as follows:

By Mr. Strasburger:

> Q. Didn't you so testify? A. I did so testify.
>
> Q. It is still the truth? A. As I explained it—at that time I believe[d] some day I might inherit and that therefore whatever was done to grow from that would be my interests.

And, just shortly before, II R. 521, Michael had testified, also on cross-examination, that he did not know that he and his brother had "valuable interests in Dallas", and, further, that his mother had not explained to him and his brother that "she only got the income from this property in Dallas, and on her death" it would be theirs. "She explained", he testified, "that she had properties in Dallas", and that his "understanding from her explanation was, one day we didn't have much * * *." He concluded that his "mother wanted" him and brother "to believe that we had to go and earn our own money, rather than wait for an inheritance." Pet. 17.

Thus, when considered in its context, the testimony on which respondent relies makes it clear that Michael had no understanding that he had any independent interest in the trust property, and believed only that some day he might possibly inherit it from his mother. In this circum-

stance, Michael's passivity can not give rise to the inference to which respondent is necessarily driven to support its contention that Kelton was authorized to appear for Michael in the State Court case, i.e., that Michael had authorized his mother to act for him with respect to his independent remainder interest. Obviously, since he did not know of such interest, nothing he did or failed to do can be taken as having reference to it.[8]

The record is clear that this is equally applicable to James, as well. Thus, on cross-examination by one of respondent's attorneys at the trial, IV R. 1753, 1754, with respect to his testimony on deposition, on which respondent relies, Brin. Br., pp. 14, 15, to the effect that he "thought" Dorsey "represented" him because he represented his mother, as they "were all of the same family," James testified:

> Q. * * * You said that didn't you? A. Yes.
>
> Q. You still say the same thing, do you affirm that today? A. No, because what I implied here is actually what I am saying today, in effect, that I am my mother's son. Naturally I was interested in seeing

[8] Respondent's lengthy quotation, Brin Br., pp. 16-18, from Dorsey's testimony to the effect that Michael had intimated in 1956 with respect to a completely unconnected matter that he would abide by his mother's wishes and that Michael and James had attended prior to March 1960 Dorsey's conferences with Mrs. Grey in regard to the proposed partition of properties held in common by Mrs. Grey with the O'Connor and Morgan Trusts, proves nothing, since Michael did not become of age until March 7, 1960, II R. 512, and since Dorsey's statement that he made his March 21, 1960 proposal of partition on behalf of Mrs. Grey, James and Michael is negated by that very proposal which was made solely on behalf of Mrs. Grey, VI R. 539-540 and by Dorsey's testimony that he "was acting solely for the interest of Mrs. Grey bearing in mind that [he has] had the advice of her two sons, as helpful as they could be in this partition". III R. 1229.

that she got taken care of in the best possible way, but *I can't say he represented me, because I didn't know at that time that I had the rights that I have.*

Q. Well, please, let's go back and read that sentence. A. Well, *I couldn't rely on anybody when I didn't know why—know what my rights were. I didn't even think about it—nobody ever told me about them, so how could I leave it to anybody.*

Q. Do you still say that you thought because he represented your mother, he represented you because you were members of the family? * * * A. I don't still say that—*what I say—and what I meant there was that at that time I didn't know that I had any rights.* It was entirely in my mother's hands what she did with her assets. Therefore, when she had an attorney, it was her business and I could only hope that he would take care of her matters. [Emphasis supplied.]

If, as James and Michael testified, they were wholly ignorant of their independent rights and interests in the trust property, and thought only that they might (or might not) someday inherit it from their mother, respondent's Tinker-to-Evers-to-Chance argument that Kelton was authorized to appear for them in the State Court case must fail, regardless of whatever else they knew or whatever part they took, or did not take, in the events leading to the partition and sale agreement. It is one thing for sons to appear to evince some interest in, and to appear to acquiesce in their mother's decisions regarding a transaction involving what they believe to be her property only, but it's quite another for the remaindermen of interests in property to authorize the life tenant to act for them. If, as we assume, Kelton did not know what the *fact* was in

that regard when he purported to appear for James and Michael, it must be recalled that he never spoke or corresponded with either of them. Pet. 30, 19a.

Respondent betrays its complete lack of confidence in its efforts to find some support for its position in the record herein by arguing, Brin Br., pp. 7-8, that James and Michael were not necessary parties to the State court action or that their "interests were virtually represented by their mother, Mrs. Grey". Indeed, par. 4.01 of the Partition and Sale Agreement expressly provided that it was "subject to the condition that a judgment be entered . . : in a proceeding in which . . . the remaindermen, individually and as representatives of the class consisting of the issue of Mrs. Grey are parties . . .", I R. 114, and par. 4.05 thereof that if any condition, including the one quoted above, was not complied with by December 31, 1960, the agreement would become null and void, I R. 116.

Moreover, respondent quotes out of context par. C of article 7425 (b)—24 Tex. Civ. St. by carefully omitting the sentence immediately preceding: "If the action is predicated upon any act or obligation of any beneficiary, such beneficiary shall be a necessary party to the proceedings." Pet. 32a-33a, which clearly limits the meaning of the sentence quoted by respondent, the first words of which are: "the only necessary parties to *such actions* . . .", to [redacted] actions "predicated upon any act or obligation of any beneficiary." It is obvious, therefore, that the sentence quoted by respondent, Brin Br., p. 7, is completely unrelated to a proceeding under par. E of 7425(b)—24, Tex. Civ. St., Pet. 33a, to relieve a trustee from prohibition of self-dealing. The term "beneficiary" as used in par. E of said section is clearly taken in its general meaning defined by Article 7425(b)—4 (J) as: "Any person entitled to re-

ceive from a trust any benefit of whatever kind or nature", which includes any remaindermen.[9].

VI.

Unable to challenge Petitioners' demonstration that the special verdict of the jury on the issue of damages and of market value of the A'Mell Building was predetermined by the District Court's instruction as to the binding effect of the State court judgment, Pet. 20, respondent argues that such verdict is supported by the appraisals made by Mr. Dunham and by the Dallas Real Estate Board. Brin Br., p. 20. Respondent however carefully fails to mention that Mr. Dunham's appraisal was made in June 1955, VI R. 293, 304, more than five years prior to the sale involved here and that the Dallas Real Estate Board's appraisal made on October 9, 1959, VI R. 545 at $500,000, i.e. $28.57 per square foot, had no relationship whatsoever to the value of the properties in Block 60 in September 1960, for the respondent's own estimate of some of the properties therein in February 1960 was at an average of $100 per square foot, V R. 135 and respondent's own schedule of prices paid for the other properties in the same block showed a high of $93.33 per square foot and a low of $48 per square foot. Significantly, respondent's President Mr. Stewart admitted at the trial that some of the properties in the block had been acquired at "bargain" prices, II R. 611.

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[9] Under Texas laws, a trustee owes the same fiduciary duty to life tenants and to vested and contingent remaindermen, *Brown* v. *Scherck*, 393 S. W. 2d 172, 181 (Tex. Civ. App.).

Similarly untenable is respondent's argument, Brin Br., p. 8, of virtual representation of James and Michael by Mrs. Grey, for it is elementary that the act or consent of one trust beneficiary is never binding upon another beneficiary and that a life tenant cannot act for and bind a remainderman. *Bogert,* Trust and Trustees (2nd Ed.) §941, pp. 391-392; *3 Scott on Trusts* (3rd Ed.) 216.2, pp. 1736-1738.

Thus, respondent's references to obsolete appraisals serve only to confirm that, but for the disputed instruction of the District Court, the jury could not have found any basis in the record for its special verdict.

Respondent displays a similar disregard of the most fundamental principles of the law of trusts in stating that the payment of brokerage commissions to Majors on the sale of Republic Garage Building, allegedly Majors' own property, did not have to be revealed to petitioners because "there was no representation that there had been no commission" Brin's Br., pp. 20-21.

Majors himself testified that he had never heard of a seller receiving a brokerage commission in selling his own property, IV R. 1680.

Respondent also disregards the record in arguing, Brin Br., p. 21, that "the only claimed relevance" of the payment of commission and the forgiveness of additional interest on Majors' defaulted note after maturity "was that Mrs. Grey wanted to get more for the A'Mell Building than the Bank paid for the Republic Garage Building." Respondent conveniently overlooks its admission that it had knowledge that the sales price for the A'Mell Building was computed for the 10,000 interior square feet thereof at the price of $59.64 per square foot represented by respondent to be paid to Majors for Republic Garage Building, with a bonus of 25% for the corner portion of the A'Mell Building, III R. 1465-6; 1019-20.

No one could seriously contend that comparison of prices for properties in the same block may be made regardless of their respective size. A'Mell Building contained 17,500 square feet, while Republic Garage Building contained only 10,900 square feet. I R. 138.

Respondent fails to mention that it had expressly acknowledged that in determining the price for the A'Mell Building, Mrs. Grey had relied on the truthfulness and correctness of respondent's schedule of prices submitted by it to Mrs. Grey, I R. 139-140. Obviously, the payment to Majors of a commission on the sale of his own property and other advantages granted to Majors were certainly relevant to the question of truthfulness and correctness of respondent's schedule of prices.

CONCLUSION

Respondent's sixty-six pages of opposition in its several capacities, like the manner in which it laid the State Court action,[10] would obscure the issues, and what they involve.

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[10] In the State Court action, respondent named itself, in its private capacity, as plaintiff, Mrs. Grey, James, Michael and itself as trustee of the James Charles O'Connor trust, itself as trustee of the Ivor O'Connor Morgan trust, and the Texas Attorney General, as defendants. I R. 124, 125. Kelton appeared for Mrs. Grey, James, Michael and respondent as trustee of the O'Connor trust. Other attorneys appeared for respondent in its other capacities. Obviously, when a trustee wishes itself to purchase property from its trust, the "controversy" is between the trustee, as such, and the trust beneficiaries, and not between them and their trustee in its "private" capacity, which is necessarily a stranger to them. Thus, respondent's arrangement of the parties obscured the conflict between it as trustee of the O'Connor trust and Mrs. Grey, James and Michael, inherent in the situation. It is noteworthy that in this action (in which the parties were necessarily the same as in the State Court action) the District Judge charged the jury, I R. 292, that one of the issues in the case was "Whether the First National Bank *in its individual capacity* misrepresented or concealed material facts", etc. [Emphasis supplied.] However, as the beneficiary of the O'Connor trust, Mrs. Grey dealt with respondent in its fiduciary capacity as trustee of the O'Connor trust, and not with respondent in its "individual capacity", as some outside third-party.

her failure to respond to the jury's inquiry;

The revealing remarks of the trial judge, the attempt to suppress them, the peculiar nature of her charge, in conflict with both *Callen* and the standard set up by Rule 49(a), the adequacy of Kelton's appearance in the State Court action to satisfy the requirements of due process, and the affirmance by the Court below, point to the conclusion that the petition should be granted.

Respectfully submitted,

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